No. 22507

United States
COURT OF APPEALS
for the Ninth Circuit

In the Matter of

PORTLAND NEWSPAPER PUBLISHING COMPANY, INC.,

Bankrupt,

R. ANTHONY DUBAY,

Appellant,

v.

EVERETTE H. WILLIAMS, Trustee in Bankruptcy of PORTLAND NEWSPAPER PUBLISHING COMPANY, INC.,

Appellee.

On Appeal from the United States District Court for the District of Oregon

BRIEF OF APPELLANT R. ANTHONY DUBAY

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STATEMENT OF THE CASE

The following chronology may be helpful in understanding this case.

1. February 8, 1960 — Portland Reporter Publishing Company, Inc. incorporated and begins publication of the "Portland Reporter," a weekly and later daily newspaper in Portland, Oregon (Ex. 2).

2. July 31, 1962—Reporter assigns to DuBay certain advertising accounts as security for DuBay's signing a collateral agreement which enabled Reporter to obtain bank credit (Ex. 16). Ledger cards of advertising accounts assigned to DuBay were marked "R.A.D." with the date of the assignment (Tr. 16-17, 40-41, 71, 96).

3. August 31, 1962—New advertising accounts assigned to DuBay (Tr. 16).

4. April 30, 1963—New advertising accounts assigned to DuBay (Tr. 16).

5. September 1, 1963—Commercial Code of State of Oregon goes into effect (Oregon Laws 1961, ch. 726, § 428).

6. September 30, 1963—DuBay and Reporter file financing statement showing assignment of accounts receivable and proceeds (Ex. 3).

7. November 30, 1963—New advertising accounts assigned to DuBay (Tr. 16).

8. December 18, 1963 — DuBay signs guarantee agreement at bank to secure further the line of credit of Reporter (Ex. 16).

9. February 24, 1964—New advertising accounts assigned to DuBay (Tr. 16).

10. March 6, 1964—DuBay and Reporter reaffirm earlier assignments of "future accounts receivable assigned or to be assigned pursuant to said agreements" (Ex. 39).

11. April 21, 1964—New advertising accounts assigned to DuBay (Ex. 16).

12. April 22, 1964—Portland Reporter Publishing Company, Inc. merged into Portland Newspaper Publishing Company, Inc. which continues to publish the "Portland Reporter" (Ex. 1).

13. September 28, 1964—DuBay and other secured creditors start to collect all accounts receivable directly from assigned advertising account debtors (Ex. 36).

14. October 15, 1964—Bankruptcy petition filed (Tr. of R. 129).

15. December 15, 1964—Trustee in Bankruptcy files petition to have DuBay and other secured creditors pay over proceeds of assigned accounts (Tr. of R. 130).

16. May 25-May 27 and June 10, 1965—Referee conducts trial (Tr. of R. 131).

17. February 9, 1966 — Referee rejects DuBay's

claim on numerous grounds, including holding that floating lien section of Uniform Commercial Code is superseded by federal bankruptcy law for accounts that become due within four months of bankruptcy (Tr. of R. 1).

18. March 11, 1966—DuBay files petition for review (Tr. of R. 65).

19. January 27, 1967—District Court hears arguments (Tr. of R. 135).

20. August 22, 1967—District Court opinion reverses Referee on validity of Uniform Commercial Code but rejects DuBay's claim on grounds that no lien on future balances in assigned advertising accounts and later assignments not in proper form (Tr. of R. 89).

21. November 7, 1967—District Court enters final order (Tr. of R. 136).

22. November 30, 1967—Appellant DuBay files notice of appeal to this Court (Tr. of R. 136).

STATEMENT OF FACTS

R. Anthony DuBay whom the Referee found to be a "public spirited citizen" (Tr. of R. 19, l. 19) was a director of Portland Reporter Publishing, Inc. (hereinafter called Reporter) from December 2, 1961 to April 22, 1964, for which he received only a nominal consideration (Ex. 2). Reporter published a daily newspaper in Portland, Oregon. On June 26, 1962, DuBay, without personal benefit to himself, signed

a collateral agreement to enable Reporter to obtain a bank loan of $25,000 (Ex. 16). Te secure DuBay against loss, Reporter by written agreement on July 31, 1962, assigned certain advertising accounts of the newspaper to DuBay. The agreement provides, among other things,

> "Whereas, Assignor desires to assign to Assignee accounts receivable which are unpaid but which are due and owing or which will become due for advertising services rendered by Assignor . . .
>
> "1. The assignee will from time to time, during the continuance of this agreement, select such accounts receivable as shall total not more than $40,000 at any one time. In the event that the total amount of the accounts at any time exceeds $40,000 then there shall be a pro rata deduction from the accounts so that the total is not more than $40,000.
>
> "4. In order to avoid objection by, and any possible loss of trade from, any of Assignor's customers, through the collection of said accounts by the Assignee direct from the debtors, it is agreed that the Assignee gives to Assignor the privilege to collect said accounts as the Assignee's agent. Upon such collection, Assignor shall, providing it is in default as defined in paragraph 7, forthwith turn over the proceeds to Assignee and Assignee shall have the full right to deposit the debtor's checks and remittances in his own bank accounts. This agency for collection may be terminated by the Assignee at any time."

Other provisions of the agreement provide for a

method of selection of the accounts, the maintenance of a level of accounts, a form of assignment, financial reporting, that assignor must accept a reassignment of accounts that cannot reasonably be collected, that assignor must "make proper entries on its books and records disclosing the assignment," that assignor was entitled to the proceeds of assigned accounts until default on the bank loan or other specified circumstances and that assignor collected the accounts for payment over to assignee upon default. Attached to the agreement is a list of certain advertisers of Reporter and an appointment by assignee of assignor "as my agent to collect said accounts and disburse the same" (Ex. 16).

The advertisers whose accounts were assigned to DuBay "were generally frequent advertisers. They were recurring" (Tr. 86, l. 18). "A majority of them would have had advertising contracts for space" (Tr. 86, ll. 21-22). Normally between the 15th and 20th of each month almost all of the bills of Reporter were paid (Tr. 28, ll. 20-21).

The assigned accounts were designated as assigned on the books of the company with DuBay's initials and the date of assignment written on the ledger card of each advertiser whose accounts was assigned. A periodic review was made of the assigned accounts and new lists of accounts were assigned on August 31, 1962 and April 30, 1963 and similarly identified on the ledger card of the specific account with the words "R.A.D." plus the date of the assignments in red ink. The controller of the company furnished

DuBay with a memorandum of the "new assignments" Tr. 16-17, 40-41, 71, 96). The assignments of August 31, 1962 and April 30, 1963 did not follow the form of assignment attached to the original agreement. They bore the typewritten signature of Keith W. Plotner, controller, but did not bear an ink signature. These assignments contained the words "the following lists of accounts receivable taken as of [date]_____ is to show the current standing of the original assignment of these accounts" (Ex. 16).

On September 1, 1963 the Commercial Code of the State of Oregon went into effect containing language similar in most but not all respects with the Uniform Commercial Code (Oregon Laws 1961, ch. 726, § 428). Thereafter on September 30, 1963 a financing statement signed by DuBay and Reporter was filed in accordance with Oregon law showing that the accounts receivable and their proceeds had been assigned (Ex. 3). On December 18, 1963 DuBay entered into a guarantee agreement with the bank which pledged his general assets to the repayment of the Reporter's loan. This was in addition to the collateral pledge which had been signed in June, 1962 (Ex. 16). On November 30, 1963, February 24, 1964 and April 21, 1964 numerous accounts were assigned to DuBay, similarly identified on company books with his initials and the date of the assignment, and DuBay was furnished with a memorandum of each new assignment by the controller of the company which again contained the language "the following lists of

accounts receivable taken as of [date] ---------- is to show the current standing of the original assignment of these accounts" (Ex. 16, Tr. 16-17, 27, 40-41, 44-45).

DuBay terminated the company's agency for collection of his accounts on February 27, 1964 and collected all of the assigned receivables himself, along with other secured creditors until March 6, 1964 when by written agreement the agency for collection was re-established. At that time DuBay and Reporter on March 6, 1964 entered into a new agreement which provided in part as follows:

> "All agreements and assignments between the parties hereto, or any of them, are hereby affirmed and shall continue in full force and effect.
>
> "2. Without prejudice to any future rights of Davis and DuBay, and, without limiting the foregoing and without prejudice to their rights, or to the rights of either of them, to again invoke the provisions of their agreements with the Reporter, as assignor, the said Davis and DuBay do hereby release all sums heretofore collected on said accounts receivable pursuant to said assignment and once again, and until further written notice, nominate and constitute the said Reporter to be their agent and the agent for each of them for the purpose of collecting said accounts, *together with all future accounts receivable assigned* or to be assigned *pursuant to said agreements.*" (emphasis supplied) (Ex. 39).

On April 22, 1964, Portland Reporter Publishing

Company, Inc. was merged into Portland Newspaper Publishing Company, Inc. The surviving corporation assumed all of the debts and liabilities and continued to publish the "Portland Reporter" newspaper (Ex. 1).

On September 28, 1964, DuBay again terminated the agency for collection and thereafter collected along with other secured creditors all of the assigned accounts directly from the debtors of Reporter (Ex. 36). This bankruptcy petition was filed on October 15, 1964 (Tr. of R. 129). None of the collections on the accounts assigned to DuBay have to this date been surrendered to the Trustee in Bankruptcy (Ex. 39).

SPECIFICATION OF ERRORS

1. The court erred in holding that the security agreement of July 31, 1962 did not give DuBay a lien on future balances in the assigned advertising accounts.

2. The court erred in holding that the later DuBay assignments "did not even contain words of assignment or the signature of the debtor."

QUESTIONS PRESENTED

1. Did the parties to the security agreement intend to assign to DuBay the fluctuating balances in certain named advertising accounts?

2. Did the parties intend periodically to modify

the agreement by assigning new advertising accounts?

3. Did the court below ignore the intention of the parties and the course of dealing between them in rejecting the DuBay assignments?

4. Can the intention of the parties be carried out under the law of Oregon?

SUMMARY OF ARGUMENT

This appeal of R. Anthony DuBay seeks to reverse the decision of the District Court that accounts receivable which were assigned to him by the predecessor of the bankrupt up to twenty-seven months before bankruptcy are voidable preferences. To reach this result, the court held that the assignment of certain named advertising accounts did not give DuBay a lien on future balances in those accounts. The court also held that later assignments of new advertising accounts were not in proper form and did not contain the signature of the debtor.

DuBay contends:

(1) The evidence is uncontradicted that the parties to the security agreement intended to assign to DuBay the fluctuating balances in certain named advertising accounts.

(2) The evidence is uncontradicted that the parties intended periodically to modify the agreement by assigning new advertising accounts.

(3) The court below ignored the intention of the parties and the course of dealing between them in rejecting the DuBay assignments.

(4) The intention of the parties can be carried out under the law of Oregon.

ARGUMENT

I. The Court Erred in Holding That the Security Agreement of July 31, 1962, Did Not Give DuBay a Lien on Future Balances in the Assigned Advertising Accounts.

A. The evidence is uncontradicted that the parties to the security agreement intended to assign to DuBay the fluctuating balances in certain named advertising accounts.

In the newspaper business an advertising account has a well understood trade meaning. The accounts assigned to DuBay were regular, frequent, recurring advertisers, most of whom had advertising contracts (Tr. 86, ll. 18-22). These advertisers would advertise frequently, would be billed monthly and would usually pay their bill by the 15th or 20th of the following month (Tr. 28, ll. 20-21). It is clear that the parties understood that the term Montgomery Ward account (as an example of one account on the DuBay list) meant the fluctuating balance in the Montgomery Ward account. When the bill was paid monthly for the preceding month's advertising the balance would decrease. Further advertising would increase the balance in the account.

The salesman who was assigned to the Montgom-

ery Ward account was not concerned with the balance in the account at any particuar day. He had a continuing relationship with this advertising account. The continuing relationship with the major, frequent contract advertising accounts was the lifeblood of the newspaper.

This continuing nature of the account was well understood by the parties. Thus, when the controller of the company made up the later assignments he would "show the current standing of the original assignment of these accounts" (Ex. 16). The current standing was the amount that was in the account on the date of the memorandum. The controller very clearly understood and expressed in the memorandum of assignment itself that the current standing of the account on assignment date was very different from the account itself.

Just before the bankruptcy an additional assignment of accounts was made. DuBay has stipulated that this last assignment is of no effect. The testimony of the controller, however, is of considerable interest in appreciating the understanding of what was assigned. On page 20 this occurs:

> "Q. And are you speaking of the balances on October 14th on the accounts listed on April 21st?
>
> A. These are new accounts.
>
> Q. I understand. But this was to make up what you indicated was a deficiency in the accounts on the list of April 21st?
>
> A. Correct.
>
> Q. In other words, the balances owing on the

accounts included in the list of April 21st came to $35,000 minus $6,100; is that right?

A. Right." (Tr. 20)

Thus, almost six months after the assignment of April 21, the controller understood that there was almost $29,000 in the accounts assigned to DuBay. Obviously if the account only meant the then balance in the account on April 21, most of the accounts would have been paid off at the next billing period during the month of May, and by October there would have been hardly anything in the accounts assigned to DuBay.

The controller reviewed the accounts assigned every few months, removed some from the list and added others. In making this periodic review, "the first objective was to keep the accounts that had balances . . ." (Tr. 17, ll. 15-16). In a discussion of earmarking of the DuBay accounts the controller was asked these questions:

"Q. Suppose it were paid off. What did you do with the stamp on it showing assigned and 'R.A.D.'?

A. The stamp remained on the card until a new assignment, a new list of accounts was made.

Q. And this would be true even though the account had been paid off in the meantime.

A. This would be true." (Tr. 96, ll. 19-25)

Thus if new balances came into the account they would be covered by the assignment.

If anybody had ever thought that some subsequent

court would construe the Montgomery Ward account or the Safeway Stores account to mean a specific amount in the account on a specific day, then new accounts would have had to be assigned at least monthly and very possibly more frequently than monthly to maintain the $35,000 that was supposed to be assigned to DuBay.

The DuBay agreement provides that "In the event that the total amount of the accounts at any time exceeds $40,000 [later changed to $35,000] then there shall be a pro rata deduction from the account so that the total is not more than $40,000" (Ex. 16). If the parties had understood the account to be the balance on any specific day, then this language is meaningless. The parties here are saying that if the fluctuating balances in the assigned accounts exceed the agreed sum, then there shall be a reduction in the security.

The fact that the parties well understood that future balances in these accounts were being assigned by these various assignments need not be left to the mass of evidence already discussed. The agreement of March 6, 1964, the reaffirmation agreement after the Code went into effect and after the early release of receivables to the Reporter, specifically says: "*together with all future accounts receivable assigned or to be assigned pursuant to said agreements.*" The parties mentioned both "assigned" and "to be assigned" pursuant to said agreements. They thus made it absolutely clear that future accounts receivable were

being assigned pursuant to said agreements. They said so in black and white (Ex. 39).

The court's opinion stated that "the security agreement executed in July, 1962, did not give DuBay a lien on future accounts" (Tr. of R. 102). The court ignored the assignment of the fluctuating balances in the named advertiser accounts. The opinion makes no reference to the agreement of March 6, 1964 or the uncontradicted evidence throughout the transcript of the way the parties used the word "account."

B. The intention of the parties can be carried out under the law of Oregon.

The fact that the parties, Reporter and DuBay, well understood that the assignment of a specific advertising account meant the fluctuating balance in the account, which in the future might be higher or lower, seems clear. The question then arises, is there anything in the Commercial Code of Oregon which prevents the word "account" from being used in the way the parties understood it. The answer is that there is not.

The Uniform Commercial Code provides as follows:

> "1. 'Account' means any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper."

Then, in Oregon law, unlike the law of any other

state that has adopted the Uniform Commercial Code, the definition of an "account" is immediately preceded with the words "unless the context otherwise requires" (Cf. UCC § 9-106 and ORS 79.1060; I Bender UCC Service 664).

In looking at the context we are also to remember that

> "(3) 'Agreement' means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in ORS 71.2050 and 72.2080." ORS 71.2010(3)

The official comment to Section 1-205:1 of the Code headed "Course of dealing and usage of trade" includes the following:

> "This section makes it clear that;
>
> "1) This act rejects both the 'lay-dictionary' and the 'conveyancer's' reading of a commercial agreement. Instead the meaning of the agreement of the parties is to be determined by the language used by them and by their action, read and interpreted in the light of commercial practices and other surrounding circumstances. The measure and background for interpretation are set by the commercial context, which may explain and supplement even the language of a formal or final writing."

The Official Comment to § 2-208:1 headed: "Course of performance or practical construction" states in part:

> "1) The parties themselves know best what they have meant by their words of agreement and their action under that agreement is the best indication of what that meaning was. This section thus rounds out the set of factors which determines the meaning of the 'agreement'."

In our case the record is replete with evidence that the parties understood that there was assigned to DuBay the fluctuating balances in the specific advertiser accounts. A similar problem arose in *In re Bergston*, 3 UCC 283 (D., Conn., 1965). Referee Seidman upheld the security agreement in that case even though the number of payments and the amount and date of each payment were not set out. The Referee stressed,

> ". . . the parties unquestionably understood the terms of the agreement, which at the time of bankruptcy had been in effect for approximately two years, during which time there was no apparent difficulty between the parties in interpreting this agreement." (3 UCC at p. 290)

Oregon law also tells us in ORS 71.1020 that

> "The Uniform Commercial Code shall be liberally construed and applied to promote underlying purposes and policies."

The case of *Rosenberg* v. *Rudnick*, 262 F. Supp. 635 (D., Mass. 1967) decided on January 18, 1967 could easily apply to our situation:

> "The transaction here was not one of those which the provisions of Sec. 60 were designed to avoid. There was nothing here in the nature of

> a secret lien. There was no attempt by one creditor to outrace others at the last moment before bankruptcy. Defendant here bargained for and acquired his security interest at the time he made his loan."

The DuBay agreement was made back in July, 1962, at a time when Reporter had a very substantial capital surplus. On December 31, 1962, some months later the Reporter had a capital surplus of $177,497 (Ex. 5) even though it had been absorbing severe losses in the initial period of publication of the new newspaper. The assignment of the accounts of certain named advertisers that was made to protect DuBay was well understood by the parties. There was never any question of the transaction which continued for a period of well over two years until the present ingenious challenge of the Trustee in Bankruptcy (Tr. 42, ll. 3-7). In refusing to let the parties define the word "account" to mean the continuing account of a named advertiser, the court took a formalistic approach which is contrary to the principal aim of the Oregon Commercial Code.

II. The Court Erred in Holding That the DuBay Assignment "Did Not Even Contain Words of Assignment or the Signatures of the Debtor."

A. The evidence is uncontradicted that the parties intended periodically to modify the agreement by assigning new advertising accounts.

The actual words of "hereby transfers, assigns and sets over" are contained in the "assignment"

which is attached to the original agreement. Later assignments do not contain these magic words but refer to the original assignment and use language such as "Accounts Receivable Assignment To Anthony DuBay, April 21, 1964" (Ex. 16). The question presented is whether calling a document an "assignment" is sufficient, or whether the verb "assign" or its equivalent must also be used (Ex. 16).

These later assignments did not follow the wording of the original assignment. The parties could vary the wording if they chose to do so. All agreements and assignments between them were reaffirmed on March 6, 1964 by the written agreement of DuBay and Reporter. In the agreement of March 6, 1964 the parties said "*together with all future accounts receivable assigned or to be assigned pursuant to said agreements.*" (emphasis added). The parties understood that these were assignments. The controller of the company so described them repeatedly in his testimony (Tr. 16, ll. 21-24; Tr. 40, l. 20; Tr. 41, l. 1; Tr. 42, ll. 3-7). Every time new assignments were made the words "R.A.D." were written and the date stamped in red ink on the ledger card of the advertiser.

The parties knew that accounts were being assigned, all creditors had notice from the financing statement which set forth the assignment of "accounts receivable" and the proceeds, and could ascertain which accounts were assigned by making inquiry of the debtor. The law requires no more.

In the case of *In re Excel Stores, Inc.*, 341 F.2d 961 (C.A.2d 1964), a security agreement was challenged on the ground that the name of the debtor was incorrect. The court said that this was in the category of "minor errors which are not seriously misleading" (341 F.2d at 962), and then stressed that, "It is clear that the parties intended to execute a valid and binding contract" (341 F.2d at 962). In our case it is clear that the parties intended to execute valid and binding assignments. There is no contrary testimony of any sort. Creditors were entitled to "the minimum information necessary to put any searcher on inquiry" (341 F.2d at 963). The information of the periodic memoranda of assignments which referred to and really incorporated the assignments on the ledger cards was available to any creditor.

B. The assignments did contain the signature of the debtor.

Oregon law provides in ORS 79.2030 that

> "a security interest is not enforceable against the debtor or third parties unless: . . . (b) the debtor has signed a security agreement which contains a description of the collateral . . .
>
> " 'Signed' includes any symbol executed or adopted by a party with present intention to authenticate a writing." ORS 71.2010(39)
>
> " 'Written' or 'writing' includes printing, typewriting or any intentional reduction to tangible form." ORS 71.2010(46)

The first assignment to DuBay includes an ink signature. Later assignments bear the typed signature,

"From Keith W. Plotner, Controller." Plotner testified that he typed these documents (Tr. 15).

In the case of *Benedict* v. *Lebowitz*, 346 F.2d 120 (C.A.2d 1965), the court upheld the typed signature of debtor on a financing statement as being sufficient, citing the Connecticut equivalent of ORS 71-.2010(39). This definition of "signed" applies throughout the Oregon Uniform Commercial Code to security agreements as well as financing statements. ORS 71.2010.

A similar holding can be found in *Plemens* v. *Didde-Glaser, Inc.*, 244 Md. 556, 224 A.2d 464 (1966).

There was in fact an ink signature on the document of March 6, 1964 which reaffirmed all of the previous assignments and this document or the ink placed on the account ledger sheets of the Reporter showing assigned and R.A.D. and the date might be construed as taking care of the problem. Actually the typed signature of the controller was sufficient. Any creditor could have ascertained which accounts were, in fact, assigned by making an inquiry. The requirements of ORS 79.2030 for a valid security agreement have been met.[1]

---

[1] The assignment of July 31, 1962 was unquestionably in proper form. If the District Court was not satisfied that the formal requirements had been met in the later assignments, then it should at least have recognized DuBay's claim in the continuing balances of the advertiser accounts listed on the July 31, 1962 assignment.

CONCLUSION

"Courts of bankruptcy are essentially courts of equity and the proceedings are inherently in equity." *In the Matter of Stewart*, 233 F. Supp. 89 (D., Oregon, 1964).

DuBay obtained his assignments of accounts openly and at a time when the company was solvent, long before the present bankruptcy proceedings began. He sought no financial preference or gain for himself and in fact executed the collateral agreement and guarantee without any consideration to himself. DuBay helped the general creditors by providing funds to Reporter to pay wages and bills and continue the business for an additional period of over two years.

If DuBay can overcome the objections discussed herein that his documents were not in proper form, then he stands in a position of parity with Rose City Development Company, Inc. whose secured claim was allowed by the District Court. The reasons which the District Court gave for the disqualification of DuBay are not in accordance with the liberal purposes of the Uniform Commercial Code. "Technical requirements are eliminated, pitfalls are avoided." *In re Excel Stores, Inc.*, supra, at 963 (quoting with approval the official UCC Commissioner's comment).

DuBay now seeks only to have this Court carry out the agreements that he made in good faith with

the Reporter in accordance with the law of the State of Oregon.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DON S. WILLNER,
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R. Anthony DuBay